BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

THIS DECISION DESIGNATES FORMER TAX DECISION NO. T-82-51 AS A PRECEDENT DECISION PURSUANT TO SECTION 409 OF THE UNEMPLOYMENT INSURANCE CODE

In the Matter of:

DOUG J./LINDA D. CHAPMAN
(Petitioner)

PRECEDENT
TAX DECISION
No. P-T-425

Employer Account No.

EMPLOYMENT DEVELOPMENT DEPARTMENT

FORMERLY
TAX DECISION
No. T-82-51

The Department appealed from the order of the administrative law judge which granted the petition for reassessment.

STATEMENT OF FACTS

On November 24, 1981 the Department levied an assessment on the petitioners in the amount of $76.22 under the provisions of sections 1184 and 1185 of the Unemployment Insurance Code. Thereafter, a petition for reassessment postmarked January 4, 1982 was filed.

On February 18, 1982 the administrative law judge notified the Department to prepare and serve on the petitioners an Answer to Petition, limited to the issue of timeliness, within 30 days. On March 18, 1982 the Department submitted its Answer to Petition. However, it was sent to the Chief Administrative Law Judge's office in Sacramento rather than the Upland Office of Appeals. On March 22, 1982 the Chief Administrative Law Judge mailed a copy of the answer to the petitioner.

On March 23, 1982 the administrative law judge issued an order granting the petition and cancelling the assessment on the grounds that the Department had not submitted its Answer to Petition within 30 days.

REASONS FOR DECISION

The Unemployment Insurance Code expressly provides for the filing of a petition to a referee in tax matters, but that it contains no express provision for the filing of any answer to the petition. Nor is there anything in the code itself that leads to an implication that the filing of an answer is necessarily expected. All that the code says in this regard is found in that portion of section 1951 which states that:

> "The manner in which . . . petitions shall be presented . . . and the conduct of hearings and appeals shall be in accordance with rules prescribed by the Appeals Board. . . ."

Pursuant to this code section, and code section 411, the Appeals Board has promulgated its rules which are found in sections 5026(a) and 5005 in Title 22 of the California Administrative Code. Section 5026(a) states:

> "Promptly after receipt and registration of a tax petition, a copy of the petition shall be furnished to the department. The department shall be allowed thirty (30) days to submit its written answer to the petition." (underscoring added)

Section 5005 states:

> "Unless otherwise specified in the code, the time for filing any . . . answer . . . may be extended or a late filing permitted upon a showing of good cause. . . ." (underscoring added)

As we have already noted, there is nothing in regard to the filing of an answer to a tax petition that is specified in the Unemployment Insurance Code.

On February 18, 1982 the Department was given 30 days to file its answer. The answer was filed on March 18, 1982, the 28th day. We believe that there was substantial compliance with the Appeals Board rules by the Department

and the answer was timely filed although it was inadvertently filed in the wrong Appeals Board office. Or if not timely filed, good cause existed for the slight delay in serving the petitioners. Accordingly, on this ground alone, the matter must be remanded to an administrative law judge for hearing and decision.

Even if the answer was not timely filed, the administrative law judge should not have granted the petition. Apparently the administrative law judge believed that section 5026(a) makes it mandatory for the Department to have filed a written answer within 30 days. We cannot find any such obligation expressed, at least not directly in section 5026(a). The exact statement of that section is that:

> "The department shall be allowed thirty (30) days to submit its written answer to the petition." (underscoring added)

The direct statement of this rule merely reserves a period of time during which the proceedings cannot progress to a hearing on the petition unless a written answer has been submitted. Nothing is said in regard to whether the Department must submit a written answer within the time allowed, or at all. The administrative law judge, however, takes the position that the effect of the Department's not doing so is the same as that of a default by a defendant under civil procedure.

That effect has been well stated by an appellate court in Jones v. Moers (1928), 91 Cal. App. 65, at pages 69 and 70, 266 Pac. 821 at page 822 to be the following:

> "Upon the failure of the defendant to answer the complaint within the time allowed by law, and upon entry of default, in the absence of fraud, the right of the defendant to participate in the litigation is terminated and the subsequent filing of an answer or demurrer on his part is unauthorized and void, unless upon proceedings had, the default is first set aside." (underscoring added)

We have underscored the words "entry of default" in the above quotation to emphasize that under civil procedure, there is another step beyond the mere failure to file an answer within the time allowed that is a necessary prerequisite to the termination of a defendant's right to participate in the litigation. This additional step is specifically provided for by statute. (See particularly, Code of Civil Procedure sections 412.20 and 585.) There are no comparable statutory provisions or even Board rules providing for the entry of a default against the Department in the type of proceeding before us.

Moreover, even under civil procedure, if an answer is filed after the expiration of the time allowed, but before entry of default, the answer is not a nullity. It will serve to preclude the plaintiff from taking a default unless and until the answer is stricken. Even then, relief from default may be granted upon proper application and showing by the defendant under Code of Civil Procedure section 437. A. B. Metal Products v. MacArthur Properties, Inc. (1970), 11 Cal. App. 3d 642 at page 647, 89 Cal. Rptr. 873 at page 875.

We think that the absence of any express statutory provisions requiring the Department to submit written answers to tax petitions suggests a certain amount of caution against simply proceeding by implication to read a civil default type of effect into the provisions of section 5026(a). As we have noted the civil procedure, itself, does not rest upon implication, but upon express provisions of statute. There are many types of administrative proceedings in which a failure to file an answer does not have a civil default type of effect. Peak v. Industrial Accident Commission (1948), 82 Cal. App. 2d 926, 187 P. 2d 905; Davis, Administrative Law, section 804 (page 528).

The legislature itself has given the Department the unique status of being a specifically designated party to all tax proceedings under the Unemployment Insurance Code. By statute the Department is entitled to notice of the administrative law judge's hearing and of his decision and is given the right to appeal it to us all without reference to any specific statutory requirement that it must answer the petition to be entitled to exercise these rights. The Department even has the right under express provisions of Unemployment Insurance Code section 410 to seek judicial review of our decisions

irrespective of whether or not it ever appeared or participated in the proceedings before the administrative law judge or before us.

These express statutory provisions do not suggest that the legislature contemplated that we should promulgate a procedural rule that would attempt to enforce upon the Department a loss of rights as a party to the proceedings similar to a default under civil procedure. There is an important public interest in having the Department present and participating in these tax proceedings. We think that the problem of the Department's not filing an answer within the time allowed should be approached in a somewhat different way.

Let us remember that in accordance with section 5036 of Title 22, California Administrative Code: "The petitioner has the burden of proving the allegations contained in a tax petition."

The Department's answer is by long administrative practice, not the type of pleading that a defendant is required to file under the provisions of Code of Civil Procedure section 437. Basically, the Department's answer consists of two parts:

1. A detailed statement of the Department's version of the facts upon the basis of which it took the action of which the petitioner complains, and

2. A detailed statement of its position in regard to the action taken.

The answer, in other words, is designed to be an informative document. It is designed to help the petitioner prepare for the hearing, and to assist the administrative law judge who has an active responsibility in this type of proceeding to elicit full and relevant information from all of the parties.

The gist of this matter is not really default, but the possibility of prejudice. Did the petitioner suffer any prejudice from the Department's failure (if there was a failure) to file its answer within the time allowed. We cannot find any indication in the record that the

petitioners herein were prejudiced in any way. Accordingly, this matter must be remanded to an administrative law judge for a hearing and decision.

DECISION

The order of the administrative law judge of March 23, 1982 granting the petition for reassessment is set aside. The matter is remanded to an administrative law judge for a hearing and decision.

MARILYN H. GRACE

JAMES J. HAGARTY

HERBERT RHODES

Pursuant to section 409 of the Unemployment Insurance Code, the above Tax Decision No. T-82-51 is hereby designated as Precedent Decision No. P-T-425.

Sacramento, California, July 22, 1982.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

DON BLEWETT, Chairman

MARILYN H. GRACE

HERBERT RHODES

LORETTA A. WALKER

JAMES J. HAGARTY